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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 417

WESTWOOD PHARMACAL CORPORATION, a corporation, and FOSTER-MILBURN COMPANY,

Petitioners,

vs.

JOHN FIELDING, JR. and DOLPH OBERGFEL,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California for the First Appellate District.

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JOHN FIELDING, JR. and DOLPH OBERGFEL,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California for the First Appellate District.

Westwood Pharmacal Corporation and Foster-Milburn Company pray that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of the State of California, First Appellate District, Division Two, entered on June 4, 1952 in the case of John Fielding, Jr. and Dolph Obergfel, Petitioners, vs. Superior Court of the State of California in and for the City and County of San Francisco, Respondent, Westwood Pharmacal Corporation and Foster-Milburn Company, Real Parties in Interest, No. 15,267 in the files of said court.

OPINION BELOW

The opinion is reported in 111 Advance Cal. App. Reports 505, 111 C.A. 2d ——, 244 Pac.2d 968.

JURISDICTION

The judgment was entered June 4, 1952 (R. 61). The Supreme Court of California had jurisdiction to grant a hearing within 60 days on petition filed within 40 (Cal. Const., Art. VI, Sec. 4(c); Rule 28, Rules on Appeal, issued by the California Judicial Council under authority of Cal. Code of Civ. Proc., Sec. 961[1]). A petition for such a hearing was filed July 14th and denied July 31st (R. 62, 66).

The time to seek certiorari began to run on denial of that petition, *American Railway Express Co. v. Levee,* 263 U.S. 19. The instant petition is therefore timely. 28 U.S.C., Sec. 2101(c).

The judgment of the District Court of Appeal is that of the highest court of the state in which a decision could be had, because no appeal lies to any state court, and the State Supreme Court refused to exercise its discretionary power to grant a hearing. *American Railway Express Co. v. Levee,* supra; *California State Auto Assn. v. Maloney,* 341 U.S. 105, 108; *Sullivan v. Texas,* 207 U.S. 416.

Jurisdiction of this Court to review the decision by writ of certiorari is conferred by 28 U.S.C., Sec. 1257(3). The proceedings were original in the court below, instituted by petition for writ of mandate (mandamus) to compel the San Francisco Superior Court (*nisi prius* court) to vacate an order quashing service of summons on the Secretary of State as service on the Real Parties in Interest (petitioners here) and to direct it to take jurisdiction over them (R. 1). Service had been quashed on the ground that petitioners, New York corporations, were not "doing business" in California (R. 8, 9, 55). The District Court of Appeal

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[1]These constitutional and statutory provisions and rules are set out in an appendix.

in its opinion summarized the issues raised as being whether (R. 58)

> "the corporations were doing business within this state within the meaning of the Corporations Code and to the extent that assumption of jurisdiction over them is consistent with due process."

The restriction as to "doing business" has had to be read into the statute by the California courts because of the compulsion of the Fourteenth Amendment. As said in *West Publishing Co. v. Superior Court,* 20 Cal. 2d 720, 726, 128 Pac.2d 777, cited in the opinion,

> "Whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be 'doing business' in the jurisdiction where the service is made to sustain its validity (*Riverside. etc. Mills v. Menefee,* 237 U.S. 189)."

The *Riverside* case cited in this passage shows that the federal constitutional provision referred to is the due process clause of the Fourteenth Amendment.[2]

Holding that due process was not violated, the District Court of Appeal ordered the writ of mandate to issue.

The question was repeated on petition for a hearing by the State Supreme Court, where petitioners assigned that (R. 63):

> "3. (a) The decision does not afford to the Real Parties in Interest 'due process of law' and it thereby violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.
>
> (b) The decision misconstrues *International Shoe Co. v. Washington,* 326 U.S 310, 90 L.Ed. 95, 66 Sup. Ct. 154."[3]

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[2]See also *Favell-Utley Realty Co. v. Harbor Plywood Corp.,* 94 F.Supp. 96 (D.C. Cal.).

[3]Petitioners there also stated that (R. 63):

> "The question presented is whether within the limits of the due process clause of the Fourteenth Amendment the Real Parties in Interest have by their activities in selling products to an independent contractor or factor rendered themselves amenable to process within this state."

QUESTIONS PRESENTED

Can a foreign corporation, by service of process on a state Secretary of State, be subjected to the jurisdiction of the courts of that state, consistently with due process under the Fourteenth Amendment, as "doing business" there within the meaning of *International Shoe Company v. State of Washington,* 326 U.S. 310, where it merely sells products of its manufacture to a local wholesaler, shipping to him from without the state, maintaining no employees in the state, soliciting no business there, and has not qualified to do business there,

(1) because it retains title to the goods as security for the purchase price, until resold by the wholesaler, when title passes to him;

(2) or because it fixes his resale prices on its trademarked articles pursuant to a state Fair Trade Act and the Miller-Tydings Amendment to the Sherman Act;

(3) or because it gives him the kind of guaranty specified by Section 303 of the Federal Food, Drug and Cosmetic Act to protect him from federal prosecution for introducing into interstate commerce goods not complying with that act;

(4) or because he utilized advertising or promotional literature supplied by it;

(5) or because of the combined presence of the facts stated in subdivisions (1), (2), (3) and (4) above?

Can it be so subjected to the jurisdiction of the state courts in the absence of any showing as to the nature of the cause of action or the residence of the plaintiff?

STATUTES INVOLVED

No statute is directly involved, but several enter into the context, viz., California Corporations Code provisions for service of process on the Secretary of State; the Miller-Tydings Amendment to the Sherman Act and the California Fair Trade Act, permitting a vendor to establish resale prices by contract with his vendee; and the provisions of the Federal Food, Drug and Cosmetic Act grant-

ing immunity from prosecution to a purchaser who has obtained a guaranty from his vendor. These are quoted in an appendix.

STATEMENT

1. The Proceedings.

In 1950, respondent Fielding filed an action in the California Superior Court, in San Francisco, naming as defendants the respondent Obergfel and petitioners Westwood Pharmacal Corporation and Foster-Milburn Company (R. 1).

Summons was purportedly served on petitioners by serving the Secretary of State of California and mailing copies to them at Buffalo, New York. They are New York corporations (R. 2), and neither had qualified to do business in California or designated any California resident as agent for service of process (R. 7, 54).

In May 1951, on petitioners' motion on special appearance the Superior Court ordered the service quashed on the ground that they were not doing business in California (R. 9). In January 1952, plaintiff and defendant Obergfel joined in filing a petition for writ of mandate (mandamus) in the District Court of Appeal to compel the Superior Court to vacate its order and to assume jurisdiction over the two corporations, proceeding against the present petitioners as the Real Parties in Interest (R. 1).[4]

In June 1952, the court ordered a peremptory writ to issue (R. 61). A petition for hearing by the Supreme Court of California was filed but denied, two judges voting for hearing (R. 62, 65).

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[4]Rule 56, Rules on Original Proceedings in Reviewing Courts, promulgated by the California Judicial Council pursuant to California Const., Art. VI, Sec. 1a, provides:

"Original Proceedings.

"(a). A petition to a reviewing court for a writ of mandate * * * shall set forth * * * also the following: * * * (2) if any * * * court * * * in the discharge of duties of a public character be named therein as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding."

The federal constitutional question of due process was duly raised and decided against petitioners, as shown in the Jurisdictional Statement (pp. 2, 3, supra).

If petitioners should appear and plead in the Superior Court, they would waive the objection to the jurisdiction; to avoid the waiver, they would have to default. *Jardine v. Superior Court*, 213 Cal. 301, 304, 305, 2 Pac.2d 756; *Sampsell v. Superior Court*, 32 Cal.2d 763, 773; 197 Pac.2d 739; *Haverstick v. Southern Pacific Co.*, 1 C.A.2d 605, 609, 37 Pac.2d 146. Absent a stay, they would thus be denied an opportunity to present to this Court the constitutional question. Issuance of the writ was therefore stayed (R. 66).

2. The Record.

Since the matter was before the court below as an original proceeding and not on appeal, no record was brought up from the Superior Court. The record on which the court below decided the case consisted solely of the petition for writ of mandate with exhibits (R. 1-46) and the demurrer and answer to it (R. 53-55).

The nature of the action in the Superior Court is not disclosed by that record; the petition for writ of mandate did not allege it, and no copy of the complaint was attached. The opinion of the court below admits that "the complaint does not appear in the record" (R. 56), but nevertheless surmises, not only that the suit was for injuries sustained from use of pharmaceuticals manufactured by the Real Parties in Interest but also that plaintiff is a California resident (R. 57, 60). These surmises have no basis in the record.

While the petition for writ of mandate revealed that the Real Parties in Interest were New York corporations, it did not allege that they were doing business in California (R. 2). The answer to that petition alleged that they were not (R. 53, 54).

For the facts concerning "doing business," the court rested on an alleged deposition taken by plaintiff of defendant Obergfel,

his co-petitioner in seeking mandamus (see R. 56, 11).[5] To avoid extraneous questions at this juncture, we state the facts as they are set forth in the opinion (R. 57, 58), clarified by reference to that deposition.

3. The Facts as to "Doing Business."

Petitioners have been treated as one for the purposes of the case (R. 57). They are New York corporations, manufacturers of pharmaceuticals, and located in Buffalo. Neither qualified to do business in California (R. 58). They had no offices in California, did not own or lease property and had no telephone listing or bank accounts there (R. 35, 57). No officers, employees or other agents resided in or ever came to California, except that the research director made two "isolated" trips there (R. 57, 60). What he did on one visit does not appear (R. 35). The other occasion was attendance at the 1948 convention of the American College of Physicians (R. 25, 57) (two years before the suit was commenced), where he merely conducted a display booth to call physicians' attention to petitioners' products, neither soliciting business nor making sales, and no calls were made on the trade (R. 26-28).

PETITIONERS' GOODS WERE MARKETED IN CALIFORNIA SOLELY BY INTERSTATE SALE TO AN INDEPENDENT MERCHANT WHO RESOLD THEM IN CALIFORNIA.

Petitioners' goods were distributed in California (and other western states, R. 18), solely by respondent Obergfel, a Los Angeles wholesaler (R. 57). Petitioners neither sold nor shipped to anyone else in California (R. 33, 37, 57), and Obergfel sold only to wholesalers who in turn sold to retailers (R. 45).

Petitioners had no interest in Obergfel's business, which he "ran * * * entirely on his own," managing his own sales force, collecting from the trade (R. 57), and assuming the credit risks (R. 17). Obergfel also sold goods of other manufacturers (R. 58).

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[5] A copy of the alleged deposition was physically attached to the petition for writ of mandate (R. 11), but it is not mentioned in the petition and does not appear to have been signed or sworn to (R. 1-3, 46). On the contrary the answer to the petition for mandate brought into the record (R. 53) an affidavit which was part of the motion to quash (R. 47-51).

The relation between petitioners and Obergfel was covered by written contract (R. 17), sent to Obergfel from Buffalo (R. 16).[6] The relation was that of seller and purchaser. The contract provided, "The Manufacturer agrees to sell and the Distributor agrees to buy the pharmaceutical products of the Manufacturer * * *" (R. 17). It also specified that Obergfel "is an independent contractor" (R. 19). Petitioners sold their product to Obergfel at prices specified in the contract (R. 17). The goods were shipped to him from Buffalo (R. 32, 33), and he stored them in his warehouse at his own expense, insured in his name, and local taxes thereon were paid by him (R. 18, 32, 33).[7]

There was no showing of the volume of products of petitioners' manufacture distributed in California.

Obergfel was not petitioners' agent. He was an independent merchant. *The court below did not deny or dispute this self-evident fact.* Instead, it held that in determining whether petitioners were doing business in California, the "distinction between an independent contractor and an agent is * * * immaterial * * *," as was "the difference between a factor and an agent or employee" (R. 58).

BASIS OF THE COURT'S HOLDING.

In holding, despite the facts stated, that petitioners were doing business in California, the court must have relied on the following circumstances, there being no others:

1. As security for payment by Obergfel of the purchase price, title to goods shipped to him remained in petitioners until he should sell them, and then it passed to him (R. 18).

2. Petitioners gave Obergfel a written guaranty (R. 21) that no drug shipped to him would be adulterated or misbranded

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[6]While Obergfel's deposition contains some legal conclusions on his part, he said that he conducted himself according to the contract (R. 44, 45), which speaks for itself.

[7]The opinion of the court below remarks (R. 58) that "It does not appear whether retailers' or consumers' orders were subject to approval by the corporation in New York, but they never in fact were rejected." But retailers' or consumers' orders did not come to petitioners. Any orders sent to them by others than Obergfel were referred to him (R. 36, 37).

within the meaning of the Federal Food, Drug and Cosmetic Act or would be an article which might not be introduced into interstate commerce thereunder, and that it would protect him in any prosecution by the United States Government.

3. The contract between petitioners and Obergfel specified the prices at which he was to resell the products (R. 19), which were trademarked (R. 14).

4. Other facts all relate to advertising. Petitioners advertised in medical journals (R. 41), and Obergfel agreed to "contact" physicians to interest them in the products (R. 18), which he did by giving them literature supplied by petitioners (R. 18, 24). Obergfel sometimes stated to physicians that he represented petitioners (R. 43) but usually mentioned only the product (R. 45). But he neither sold nor sought to sell to physicians (R. 45). As respects those to whom he did sell, he "always dealt with them as Dolph Obergfel" (R. 43). He sent out some advertising material to physicians on petitioners' letterheads, but in the business of selling he used his own letterheads (R. 45, 46).

REASONS FOR GRANTING A WRIT

The court below has decided important federal questions, some contrary to the applicable decisions of this Court, and others in a manner contrary to the basic principles this Court has announced, and its decision is in direct conflict with recent federal cases, including *Polizzi v. Cowles Magazines, Inc.*, 197 F.2d 74 (5 Cir.) in which this Court granted certiorari on October 20, 1952 (No. 287).

I. The Decision Is an Unwarranted Extension of International Shoe Co. v. State of Washington, 326 U.S. 310. It Misconceives Fundamental Predicates of That Case by Ruling That the Activities Held to Constitute Doing Business Need Not Be Those of the Corporation, and That the Question Is Not One of Power.

Obergfel was not petitioners' agent but an independent contractor. The decision must be tested on that inescapable premise, because the court stated that it was irrelevant whether he was an

independent contractor and that it was unnecessary to hold that he was an agent (see p. 8, supra). It also said that "The essential thing is merely whether the corporations are present within the state, whether they operate through an independent contractor, agent, employee or in any other manner" (R. 58). This is a contradiction in terms. If a corporation's goods are distributed by being sold to an independent contractor who then sells within the state, the corporation does not "operate" in the state.

The "minimum contacts" which, according to *International Shoe Co. v. Washington*, 326 U.S. 310, a corporation must have in a state in order to be subject to suit there must be "activities of the *corporation's agent within* the state" (p. 317). While the *International Shoe* case altered former conceptions about "doing business," it did so by giving significance to activities theretofore not thought to be of a significant *quality* (e.g., solicitation of orders). But the activity must still be, as before, an activity by an agent of the corporation. Until the present decision, no court has construed *International Shoe* as eliminating the requirement that the corporation "must be there by its agents authorized to transact business in that State" (*International Harvester Co. v. Kentucky*, 234 U.S. 579, 583). See, for example, Minton, J. in *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 650, and *Farell-Utley Realty Co. v. Harbor Plywood Corp.*, 94 F. Supp. 96 (D.C. Cal., 1950).

The court below asserts that "in the final analysis * * * this is really not a question of the power of the state * * *" (R. 60). But the due process clause of the Fourteenth Amendment is a restraint on state power. And it protects a foreign corporation from being subjected to jurisdiction of state courts unless it is "doing business" within that state in such a manner and to such an extent as to be "present" there. *Philadelphia and Reading Co. v. McKibbin*, 243 U.S. 264; *Consolidated Textile Co. v. Gregory*, 280 U.S. 85; *International Shoe Co. v. Washington*, supra; *Perkins v. Benguet Mining Co.*, 342 U.S. 437.

While the terms "present" and "doing business" have no mechanical boundaries, they not only require "activities of the corporation's agent within the state" but "such as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *International Shoe Co. v. Washington*, supra, at 317.

It is thus pertinent to note that the record below discloses neither plaintiff's residence, the nature of the particular suit, nor any connection between it and the activities said to constitute "doing business" (see p. 6, supra). Yet the burden rests upon him who asserts jurisdiction over a foreign corporation to overcome a contrary presumption by establishing that it is "present." *Consolidated Textile Co. v. Gregory*, 289 U.S. 85, 88; *Amtorg Trading Corp. v. Standard Oil Co.*, 47 F. Supp. 466; *Hurley v. Wells-Newton Nat. Corp.*, 49 F.2d 914, 917. There is no room for assumptions not founded in the record, such as were made below.

II. The Decision Is in Conflict with Recent Federal Cases, Including One Now Pending in This Court.

The decision is in conflict with *McCarley v. Foster Milburn Co.*, 93 F. Supp. 421, (wherein this Court denied a motion for leave to file a petition for writ of mandamus, *Ex parte McCarley*, 341 U.S. 902) and with *Polizzi v. Coules Magazines, Inc.*, 197 F.2d 74 (5 Cir.), wherein certiorari was granted October 20, 1952 (No. 287).

The court below recognized (R. 59) that the *McCarley* case involved "essentially the same facts" but declined to follow it. That was a suit against those who are petitioners here, for personal injuries sustained in California from use of pharmaceuticals manufactured by them. The cause of action was thus identical with what the court below presumed (but without any record) was here asserted.

After filing suit in the federal court in New York, plaintiff sought change of venue to California, under 28 U.S.C., Sec. 1404(a). In *Foster-Milburn Co. v. Knight,* 181 F.2d 949, the Second Circuit held in mandamus proceedings that venue could not be so changed unless petitioners were amenable to process in California. Thereupon plaintiff returned to the District Court and, in support of his motion, showed the identical relationship and course of business between petitioners and Obergfel, that the record here discloses. In *McCarley v. Foster-Milburn Co.,* supra, the court held that the petitioners were not "doing business" in California, that the facts were clearly distinguishable from *International Shoe Co. v. Washington,* supra, and that "in all other federal authorities cited by the plaintiff a definite distinction * * * from the one at bar is to be found."

In *Polizzi v. Cowles Magazines, Inc.,* supra, the corporation's activities in the forum state were so much greater than here that if it is held not to have been "doing business," petitioners here certainly were not, but, should it be held that it was, petitioners still were not. There, defendant not only shipped its magazines to wholesale distributors in the state, who distributed them to retailers, but it also sent them directly to local subscribers and took orders from local subscription agents, its writers went to the state for material, it placed advertising in local newspapers, and it had an employee regularly travelling through the state to check retail outlets, act as a promotion and complaint man, put up advertising displays in retail stores, and in general increase circulation. Defendant also supplied advertising material to local retailers and wholesalers. While recognizing that "the approach of some of the recent opinions to the question under review has seemed less rigid in its requirements for jurisdiction than the earlier approach," the court held that the defendant was not "doing business in the state so as to be subject to suit there" within the principles of *International Shoe Company v. Washington,* supra.

III. The Decision Is a Startling Precedent, for the Court Reached a Conclusion of "Doing Business" from Common Business Arrangements Which Do Not Support It, Either in Logic or as a Matter of Business Reality.

The decision has subjected foreign corporations to the jurisdiction of California courts on service of process on the Secretary of State because, exercising their federal constitutional privilege of selling in interstate commerce, they have shipped goods to California to a wholesale purchaser, without the presence there of any official, agent or employee, either selling goods or soliciting orders. In the context of our national economic system, the decision establishes a precedent that any corporation manufacturing goods for interstate commerce is subject to suit *in personam* in any state into which its products find their way, not by service of process on an agent, but by service on a state official.[8]

In particular, the decision will have this startling effect throughout the drug industry. In that industry resale price maintenance is more widespread than anywhere else, guarantees by manufacturers to purchasers under Section 303 of the Federal Food, Drug and Cosmetic Act are universal, and sale on consignment and furnishing of advertising material are common. Yet these elements are the basis of the decision.

Business was being done in California. *But it was Obergfel who was doing that business, not petitioners.* Mr. Justice Brandeis, with his happy combination of legal acumen and perception of business realities, has made that clear. A corporation desiring to market its goods in a foreign state and not choosing "to enter the state in its corporate capacity" may market its goods "through an independent agency without subjecting itself to the jurisdiction."

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[8]The opinion was hardly dry in the advance sheets when it was being quoted as a precedent. *Iowa Mfg. Co. v. Superior Court,* 112 Advance Cal. Appellate Reports 578, 581, 246 Pac.2d 681 (Aug. 1, 1952).

The decision was prominently reviewed in the October-November, 1952, issue of The Corporation Journal (Vol. 20, No. 8, p. 149, published by Corporation Trust Company).

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 336,[9] citing *Bank of America v. Whitney Bank*, 261 U.S. 171.

The cases have always agreed that selling to an independent distributor is not doing business within his state; it is he who does business there. E.g., *Cannon Mfg. Co. v. Cudahy Packing Co.*, supra, *Cannon v. Time, Inc.*, 115 F.2d 423, 425 (4 Cir.); *Polizzi v. Cowles Magazines, Inc.*, 197 F.2d 74 (5 Cir., 1952). The issue on which the cases have turned has been whether the local distributor is a mere agent or an independent contractor,[10] or, in an apt phrase, on whether he "acts as distributor for another [or] as distributor of goods manufactured by the other."[11]

The court below did not spell out the basis of its holding, stating, instead, that whether a corporation is doing business turns on the particular facts of a case. But a claim of constitutional rights may not be submerged in unimportance by such a generality. The relevance of facts must be tested by some principle.[12] It is necessary to inquire whether the elements upon which the court has rested lead to its conclusion. Since there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusion below, and the question whether one is "doing business" is a fact to be ascertained by this Court itself from the record. *Consolidated Textile Co. v. Gregory*, 289 U.S. 85, 86; *Niemotko v. Maryland*, 340 U.S. 268, 271.

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[9]As also stated (p. 335), "The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the State; but it does not do so as defendant's agent. It buys from the defendant and sells to dealers."

[10]For example, *Thew Shovel Co. v. Superior Court*, 35 C.A.2d 183, 95 P.2d 149, on which the court below relied, turned on the finding that "The distributor was not an independent contractor" (35 C.A.2d at 189).

[11]*Radio Station WMFR v. Eitel-McCullough*, 232 N.C. 287, 59 S.E.2d 779, 781 (1950).

[12]"To reiterate that it depends on particular facts of each case gets us nowhere unless we settle upon the angle from which the particular facts are to be considered." *Wilson v. Hudson Motor Car Co.*, 28 F.2d 347, 348 (D.C. Neb.).

Here the inquiry imposes no laborious task. The opinion below discloses only four elements which may have influenced it. To ascribe qualitative significance to any of them is to create startling precedent. We briefly consider each one.

1. BUSINESS IS DONE BY THE FACTOR, NOT BY HIS CONSIGNOR.

One of the four elements is that petitioners retained title as security to the goods they sold Obergfel, until he resold them, when title passed to him.[13]

The retention of a security title was not the carrying on of any activity in California (cf. *Norfolk & West. Ry. Co. v. Sims*, 191 U.S. 441, 446). The most that the fact could effect would be to place Obergfel's position somewhere between that of an independent merchant acquiring present unencumbered title to his stock of goods and that of a factor. Factoring is an economic commonplace. A factor is one who receives goods from another on consignment to sell, a commission merchant, with title remaining in the consignor and passing from him to the purchaser from the consignee. The proceeds belong to the consignor, to whom the factor transmits them less his factorage.[14]

Here title did not pass from petitioners to Obergfel's customers, but from petitioners to Obergfel, and the proceeds collected by

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[13]Reference is also made to the fact that the contract required Obergfel to give a monthly report of the stocks he had on hand. This adds nothing; it merely provided for information to show the state of the security and whether Obergfel had paid for the goods in accordance with his contract (R. 17). Cf. *International Fuel Service Corp. v. Stearns*, 304 Pa. 157, 155 A. 285; *Heinrich Chemical Co. v. Herman*, 251 S.W. 162, 164 (Mo.).

[14]*Cal. Civil Code*, Sec. 2026 gives this definition:

"A factor is an agent who, in the pursuit of an *independent* calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser." This definition, adopted in 1872, is not peculiar to California but was derived, according to the Code Commissioners, from Story on Agency, adding, "The description here given of a factor answers precisely to that of a commission merchant or consignee for sale." Like an attorney at law, the factor is an agent in a sense, but he is an independent contractor. Restatement of the Law of Agency, Sec. 1, Comment d, p. 10.

him were his, not petitioners', he in turn being indebted to them for what he had agreed to pay. *A fortiori,* if selling through a factor does not constitute doing business in the factor's state, petitioners were not doing business in California.

Until the decision below, it was indeed uniformly held that the factor, not the consignor, was doing the business. That principle was accepted by this Court as a point of departure for further reasoning in *Bank of America v. Whitney,* 261 U.S. 171, where the Court said (per Brandeis, J.) (p. 173):

> "The Whitney Central had what would popularly be called a large New York business. * * * Its regular New York business was transacted for it by its correspondents—the six independent New York banks. *They,* not the Whitney Central, *were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal.*"

The principle has been frequently applied, not only before but after *International Shoe Co. v. Washington,* 326 U.S. 310, both in federal and state cases.

An oft cited case is *Butler Bros. Shoe Co. v. United States Rubber Co.,* 156 Fed. 1 (8 Cir.), cer. den. 212 U.S. 577, succinctly described by this Court in *Furst v. Brewster,* 282 U.S. 493, 497, as "a case of consignments to a factor."[15] In both *Street &*

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[15]In the course of the lucid discussion in the *Butler Bros.* case the court said (p. 19):

> "The question here is * * * whether the consignor, which did not agree to do, and did not in fact, do the business of receiving, storing and selling these goods, or the factor who did contract to do, and did actually do, the business of receiving, storing, and selling these goods, in Colorado, and who received the factorage therefor, was doing that business. In a simple transaction the true answer seems clear. A farmer sends to a commission merchant in a city a dozen barrels of apples for him to sell. The factor puts them in his store, sells them, receives the proceeds, and remits them, less his factorage. The farmer from time to time sends 1,000 barrels during the season, and they are sold and the proceeds are remitted in the same way. The farmer is not carrying on the business of selling apples in the city, but the factor is. The transaction in hand is larger, but in every element which conditions its legal character and effect it is not different."

Smith Publications v. Spikes, 120 F.2d 895, 897 (5 Cir., per Hutcheson, J., 1941), cer. den. 314 U.S. 653, and *Oyler v. J. P. Seeburg Corp.,* 29 F. Supp. 927 (D.C. Tex. 1939) service was quashed on this principle. And see *Mitchell Wagon Co. v. Poole,* 235 Fed. 817 (6 Cir.).

The state cases reaching the same conclusion have been called "legion".[16]

Since *International Shoe Co. v. Washington,* supra, service of process has been quashed on this principle in *Leakley v. Canadian Pacific Express Co.,* 82 F. Supp. 906 (1949) (D.C. Alaska);[17] *McCarley v. Foster-Milburn Co.,* 93 F. Supp. 421 (D.C. N.Y. 1950);[18] *Boston Medical Supply Co. v. Brown & Connolly, Inc.,* 98 F. Supp. 13 (D.C. Mass. 1951).[19]

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[16]Thus in *Irvine Co. v. McColgan,* 26 Cal.2d 160, 165; 157 Pac.2d 847, 850 (1945), the court referred to the settled principle

> "afforded by decisions to the effect that foreign corporations are not doing business so as to be subject to the qualification laws of, or amenable to process in, states to which their products have been consigned for sale and sold by factors or commission merchants."

To the same effect: *Universal Oil Corp. v. Falls Rubber Co.,* 110 Pac.2d 296, 188 Okla. 401 (1941); *International Fuel Service Corp. v. Stearns,* 304 Pa. 157, 155 A. 285 (1931); *Southwest General Electric Co. v. Nunn Electric Co.,* 283 S.W. 781 (Tex., 1926); *Elliott Addressing Machine Co. v. Campbell,* 159 S.W.2d 967 (Tex., 1942); *Republic Steel Corporation v. Atlas Housewrecking & L. Corp.,* 232 Mo. App. 791, 113 S.W.2d 155 (1938); *I. J. Cooper Rubber Co. v. Johnson,* 182 S.W. 593, 133 Tenn. 562 (1916). As said in 17 Fletcher Cyc. Corp. (Per. ed.) 521, "The business done or carried on in the state is the business, not of the corporation, but of the commission merchants themselves * * *."

[17]"* * * the business done is that of the factor rather than that of the principal, from which it follows that the character of the activity or business is of little significance." (p. 908)

[18]The court said (p. 423):

> "While a 'factor' is an 'agent' in a sense, he occupies a position differing from that of other classes of so-called agents.
>
> "A 'factor' is an agent, who in pursuance of his usual trade or business, and for compensation, sells goods or merchandise consigned or intrusted to his possession for that purpose by or for the owner."
>
> * * * * * * *
>
> "In many cases it has been held sales made by a 'factor' or an independent contractor do not make the contractor amenable to service in the state in which the sales were made."

[19]Here in a consignment arrangement it was held that the local distributor was not an agent although the contract used the term "sales agent."

2. A VENDOR IN INTERSTATE COMMERCE OF ARTICLES SUBJECT TO THE FEDERAL FOOD, DRUG AND COSMETIC ACT DOES NOT "DO BUSINESS" IN THE VENDEE'S STATE BY GIVING HIM THE GUARANTY PROVIDED BY THAT ACT FOR THE VENDEE'S PROTECTION FROM FEDERAL PROSECUTION.

The court below emphasized the fact that "the corporations had agreed to insure Obergfel against any action on behalf of the federal government under the Food, Drug and Cosmetic Act" (R. 58), repeating, "It is proper to note that this is presumably a tort or warranty action;[20] * * * that the corporations felt that they were bound to stand behind their products as least as far as federal regulations and actions were concerned" (R. 60).

Giving the guaranty was not activity in California. Nor was it an agreement to stand suit by anyone in California. Its purpose is stated in *United States v. Dotterweich,* 320 U.S. 277, 279:—to afford "immunity from prosecution" under the Federal Food, Drug and Cosmetic Act to a vendee in interstate commerce, if he has "a guaranty from the seller of the innocence of his product."

That Act imposes criminal liability on anyone who introduces or delivers for introduction into interstate commerce foods, drugs, devices or cosmetics that are adulterated, misbranded or violate certain sections, but it provides that one shall be exempt from this liability if he has a guaranty from an American vendor that the article is not adulterated or misbranded within the meaning of the Act and does not violate the relevant sections (Act, Sec. 303(a), (c); 21 *U.S.C.*, Sec. 333(a), (c), quoted, Appendix to this brief, p. 2).

The guaranty given by petitioners to Obergfel (quoted (R. 21) is merely the guaranty here provided for and is similar to the form suggested by the Federal Security Agency in its Regulations (21 C.F.R. Sec. 2.4(b)).

A manufacturer of foods or drugs who did not give such a guaranty would be precluded, in business reality, from interstate commerce, for purchasers would not care to risk federal prose-

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[20]The surmise has no basis in the record (p. 6, supra).

cution, the dangers of which are illustrated by *United States v. Dotterweich,* supra. If the giving of such a guaranty were to constitute doing business wherever the product comes, or to be considered other than wholly extraneous, all manufacturers of food and drugs are subject to suit anywhere.

3. A VENDOR IN INTERSTATE COMMERCE DOES NOT "DO BUSINESS" IN THE VENDEE'S STATE BY PRESCRIBING THE VENDEE'S RESALE PRICES ON TRADEMARKED ARTICLES.

The court below lists, as if relevant, that petitioners set the prices at which Obergfel sold. The articles were trademarked.

The Miller-Tydings Amendment to the Sherman Act (50 Stat. 693, 15 U.S.C., Sec. 1) and the California Fair Trade Act (Bus. and Prof. Code, Sec. 16902) permit a seller of such articles, by contract with the vendee, to establish the resale price.

The rationale is the protection of the trademark. *Old Dearborn Co. v. Seagram Corporation,* 299 U.S. 183. Surely, by exercising this right to protect its trademark, a foreign corporation does not subject itself to the jurisdiction of every state where its products come. Agreeing upon the resale price imposes a contractual obligation on the vendee, but it is not an activity by the vendor in the vendee's state. The business done in the local state still remains that of the reseller, not the manufacturer. This truth is recognized in the factor cases (pp. 16, 17, supra), for the consignor ordinarily does prescribe the factor's selling price (as shown in *Leakley v. Canadian Pacific Express Co.,* 82 F. Supp. 906).

Fixing the resale price does not make the reseller the manufacturer's agent. If it did, the Miller-Tydings Amendment and Fair Trade Acts would not have been necessary, for one cannot be guilty of a price-fixing conspiracy by prescribing the prices at which his agent is to sell for him.

4. NOTHING ADDED TO NOTHING IS NOTHING.

No element noted in the court's opinion is relevant to the issue. Combining several irrelevant factors does not make a relevant total. *Favell-Utley Realty Co. v. Harbor Plywood,* 94 F. Supp. 96,

100; *Oyler v. J. D. Seeburg Corp.*, 29 F. Supp. 927.[21] The combination of elements, each of relevant quality though of insufficient quantity, may be a sufficient total, but the sum of each "without significance in determining the question here"[22] is still zero.

And this also disposes of the facts about advertising (p. 9, supra), which the court below confessed are insufficient by themselves (R. 60).

Advertising is not "doing business" even when conducted in the state by employees of the corporation itself. E.g., *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 87 ("continued practice of advertising its wares"); *Polizzi v. Coules Magazines, Inc.*, 197 F.2d 74 (5 Cir. 1952); *Whittaker v. McFadden Publications*, 105 F.2d 44 (D.C. Cir. 1939).

Here petitioners did not themselves conduct promotional activities or advertising in California.[23] Advertising in medical journals which circulate in California is not doing business there. Nor is sending advertising literature to a purchaser for his use in building up his own trade.

Some manufacturers grant buyers an advertising discount. Others supply the advertising material. These are common practices in interstate commerce, as the *Robinson-Patman Act* recognizes in prescribing that such allowances or facilities be furnished to buyers on proportionately equal terms (Clayton Act, Sec. 2(c) as amended, 49 Stat. 1526, 15 U.S.C., Sec. 13(c)). They are customary in the case of commission merchants or factors.

But the fact has always been held to be irrelevant to the issue of "doing business", e.g., *Street & Smith Publications, Inc. v. Spikes*, 120 F.2d 895, 897 (5 Cir.), cer. den. 314 U.S. 653; *Southwest General Electric Co. v. Nunn Co.*, 283 S.W. 781, 782 (Tex.).

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[21] As said in the *Oyler* case, "An ineffectual is not changed to an effectual by being joined with another ineffectual."

[22] *Street & Smith Publications v. Spikes*, 120 F.2d 895, 897 (5 Cir.).

[23] Apart from one visit to a medical convention, p. 7, supra, but that is irrelevant, in any event, as an isolated act.

CONCLUSION

From the earliest date the tendency of state courts has been to support their jurisdiction. From time to time they have had to mitigate extreme decisions after this Court has spoken. Now state courts are seizing upon the Court's restatement of the governing principles in *International Shoe Company v. State of Washington*, 326 U.S. 310 as permission to assume jurisdiction at will. It becomes necessary for this Court to make clear that there are still restraints.

It is respectfully submitted that the petition for certiorari should be granted.

Dated: San Francisco, California, October 22, 1952.

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(Appendix follows)

APPENDIX

1. *California Corporations Code,* as in effect at times in question:

"Sec. 6400. A foreign corporation shall not transact intrastate business in this State until it has filed with the Secretary of State a copy of its articles * * *."

"Sec. 6403. A foreign corporation shall not transact intrastate business in this State until it has also filed with the Secretary of State a statement setting forth all of the following:

"(a) The location and address of its principal office.

"(b) The location and address of its principal office within this State.

"(c) The name of some person residing within the State upon whom process directed to the corporation may be served, and his complete business or residence address, which shall be in the county in which the principal office of the corporation in this State is located.

"(d) Its irrevocable consent to service of process directed to it upon the person designated, and to service of process on the Secretary of State, if the agent so designated or his successor is no longer authorized to act or cannot be found at the address given."

"Sec. 6501. If the agent for the service of process designated cannot be found * * * or if no person has been designated * * * then service shall be made by delivery to the Secretary of State or to an assistant or deputy Secretary of State * * *."

"Sec. 6502. * * * Upon receipt of the process and his fee therefor the Secretary of State forthwith shall give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the State, of the service of the process, and shall forward to each office by registered mail, a copy of the process. * * *"

2. *Federal Food, Drug and Cosmetic Act* (Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U.S.C. Sec. 301, et seq.):

Sec. 301 (21 U.S.C. Sec. 331):

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

* * * * * * *

"(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 404 or 505.

* * * * * * *

Sec. 303 (21 U.S.C., Sec. 333):

"(a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor * * *.

* * * * * * *

"(c) No person shall be subject to the penalties of subsection (a) of this section * * * (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, or to the effect, in case of an alleged violation of section 301 (d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce;"

3. *Miller-Tydings Amendment to the Sherman Act* (as in effect during the times in question), 50 Stat. 693, 15 U.S.C., Sec. 1:

"* * * PROVIDED, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale * * *."

4. *California Fair Trade Act* (Business and Professions Code, Sec. 16902):

"(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor * * *."

5. *The California provisions referred to in the section relating to jurisdiction:*

Constitution, Art. VI, Sec. 4(c):

"The Supreme Court shall have power * * * to order any cause pending before a district court of appeal to be heard and determined by the Supreme Court. * * *

Constitution, Art. VI, Sec. 1(a):

"* * * The Judicial Council shall from time to time: * * * (5) adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force * * *."

Code of Civil Procedure, Sec. 961:

"The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal * * * in all civil actions and proceedings in all courts of this State * * *"

Rules on Appeal, Rule 28:

"(a) Within * * * 60 days in other [non-criminal] causes, after the filing of a decision of the District Court of Appeal, the Supreme Court, on its own motion, or on petition, may order the cause transferred to itself for hearing and decision.

"(b) A party seeking a hearing must serve and file a petition therefor within * * * 40 days in other [non-criminal] causes, after the filing of the decision of the District Court of Appeal."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 417

WESTWOOD PHARMACAL CORPORATION, a corporation, and FOSTER-MILBURN COMPANY,

Petitioners,

vs.

JOHN FIELDING, JR. and DOLPH OBERGFEL,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California for the First Appellate District.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the District Court of Appeal (R. 55-61) is reported in 111 Adv. C.A. 505, 244 Pac. (2d) 968.

JURISDICTION.

The respondents contend that the Supreme Court of the United States has no jurisdiction because no federal question was either raised or considered in the Courts of California. Respondents' position in this matter will be delineated in a later section of this brief.

QUESTIONS PRESENTED.

The statement of questions presented by counsel for the petitioners omits the following elements:

(1) That the decision in the District Court of Appeal of California was based not upon the case of the *International Shoe Company v. State of Washington,* but was based upon the California precedents and the California statutes;

(2) That the local agent was the exclusive agent in California for the petitioners;

(3) That the local representative maintained a stock of the petitioners' products in his warehouse in California at all times and sent them a monthly report concerning it;

(4) That a sales representative from the petitioners' home office in New York State came out to California in order to give instructions to the local representative;

(5) That both the New York representative and the California representative managed a display booth at a medical convention in San Francisco, where the

petitioners' products were displayed under the petitioners' own name;

(6) That the local representative customarily held himself out to California customers as being an agent of the petitioners, that he so informed the petitioners, and that the petitioners not only acquiesced in this conduct, but that they approved and encouraged such conduct.

STATUTES INVOLVED.

The "due process" clause involved in this case, if any, is that contained in Section 13 of Article I of the California Constitution; further reference to this section will be made in a later section of this brief.

STATEMENT.

Petitioners' statement of the proceedings is substantially correct, except that no federal constitutional question was ever raised or decided in the Courts of California.

With respect to petitioners' contentions concerning the record, the "surmises" made by the District Court of Appeal, namely, that the suit was for injuries resulting from the use of pharmaceuticals manufactured by the petitioners, and that the plaintiff is a California resident, have a sound basis in fact and in truth and in the record of the Superior Court, irrespective

of their basis or lack thereof in the record of the District Court of Appeal.

The facts as to doing business in California have been indicated under questions presented, supra, all of which find corroboration in the deposition of the local representative, which is Exhibit "E" to the petition for a writ of mandate. (R. 11-46.)

Petitioners' statement of the basis of the Court's holding is incomplete, as indicated hereinabove under the heading "Questions Presented".

ARGUMENT.

I. NO TIMELY FEDERAL QUESTION WAS RAISED BY PETITIONERS IN THE COURTS OF CALIFORNIA.

The first effort by petitioners to raise a federal question was in their petition for a hearing by the Supreme Court of California, after decision by the District Court of Appeal, and after decision by the Superior Court in and for the City and County of San Francisco. (R. 63.) The respondents, in their answer to the petition for a hearing by the Supreme Court of California, made the point that under the procedural practice followed by the California Courts, an issue not raised in the trial Court could not be considered on appeal and *a fortiori* could not be considered in a petition for hearing by the State Supreme Court (R. 64-65), citing authorities therefor. The Supreme Court of California denied a hearing. (R. 65.) In order for petitioners to secure a hearing

before this Court, they must make a showing that the federal question was raised at the appropriate point under state procedure, *Hulbert v. Chicago*, 202 U.S. 275; *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291.

II. THE CHANCE REFERENCE TO "DUE PROCESS" IN THE OPINION OF THE DISTRICT COURT OF APPEAL WILL NOT SUPPORT JURISDICTION BY THE SUPREME COURT OF THE UNITED STATES.

At the top of page 3 of the petition for a writ of certiorari, counsel for petitioners quotes a short section from the opinion of the District Court of Appeal in the case at bar, which says that the assumption of jurisdiction over the two foreign corporations was consistent with due process. Basing his contention upon that chance phrase, and upon that phrase alone, counsel for the petitioners is in the position of contending that the 14th Amendment to the Federal Constitution was considered by the District Court of Appeal of California. He bases his tenuous reasoning, apparently, upon the circumstances that the case at bar cites the case of *West Publishing Company v. Superior Court*, 20 Cal. (2d) 720, 128 Pac. (2d) 777, and upon the further circumstance that the case of *West Publishing Company v. Superior Court* cites the case of *Riverside, etc. Mills v. Menefee*, 237 U.S. 189; and upon the further circumstance that the case of *Riverside, etc. Mills v. Menefee* refers to the Federal Constitution as such. It is submitted that we

would have a new and startling precedent in federal jurisdiction, if an opinion might be said to have considered a federal question because the opinion cited a second opinion, which second opinion cited a third opinion, which third opinion may have considered a federal question.

In the case of *Thomas v. The State of Iowa,* 209 U.S. 258, 263, the State Court, like the State Court in the case at bar, had used the phrase "due process of law". This Court held:

> "But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the State Courts to give us the limited authority to review their judgments which exists under the Constitution. * * * A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment to the Constitution."

III. THE REFERENCE TO "DUE PROCESS" IN THE DECISION OF THE DISTRICT COURT OF APPEAL MUST BE CONSTRUED AS REFERRING TO THE CALIFORNIA CONSTITUTION.

Section 13 of Article I of the California Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property without due process of law * * *"

Under the authority of *Bowe v. Scott,* 233 U.S. 658, a reference to "due process" must be construed as referring to the State Constitution, where such Constitution contains a "due process" clause. That particular clause of the State Constitution has been interpreted as similar in purpose and scope to the "due process" clause of the Fourteenth Amendment, *Manford v. Singh,* 40 Cal. App. 700, 181 Pac. 844.

IV. EVEN IF A FEDERAL QUESTION HAD BEEN RAISED IN THE STATE COURT, THIS COURT WOULD NOT BE JUSTIFIED IN GRANTING CERTIORARI IN THIS CASE.

It has been pointed out in a lucid discussion in Vol. 18 of Fletcher on Corporations (Foreign Corporations, Section 8712), p. 339 et seq., that the criteria of whether a State may control foreign corporations differ depending upon whether the purpose of the control is (1) taxation; (2) regulation; or (3) jurisdiction for the purposes of suit. There are many citations to show that less is required for purposes of jurisdiction than for purposes of either taxation or regulation, in particular the case of *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915, an opinion by Justice Cardozo.

Counsel for the petitioners places great reliance upon *International Shoe Company v. State of Washington,* 326 U.S. 310. That case involved the power of the State of Washington to tax the foreign corporation, not just the power of the Courts of Washing-

ton to take jurisdiction over it. In that case, Mr. Chief Justice Stone said,

> "An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant in this connection."

The District Court of Appeal in the case at bar made a similar comment.

The petitioners seem to place reliance on the case of *Polizzi v. Cowles Magazines, Incorporated*, 197 Fed. (2d) 74 (5th Cir.). It is here submitted that petitioners misconstrue that case. There is no conflict between the *Polizzi* case and the case at bar for the reason that the *Polizzi* case was concerned with the construction of Florida law by a Federal District Court sitting in Florida and the case at bar is concerned with the construction of California law by a State Court of California. Neither one of these two cases involved a consideration of the Fourteenth Amendment to the United States Constitution. In the *Polizzi* case the Circuit Court of Appeals held that the foreign corporation in question was not doing business in Florida, with one judge dissenting and with the two who constituted the majority not delineating the reasons for their decision in any detail. Just as surely as the American judicial system is made up of a number of jurisdictions, each of them sovereign, there is room for difference between the law of Florida and the law of California with respect to this question as with respect to many other ques-

tions, and both may still be within the orbit of the Fourteenth Amendment to the Federal Constitution (even if that question had been raised and considered). It is interesting to note that the *Polizzi* decision cites *Rosenthal v. Frankfort Distillers Corporation*, 193 Fed. (2d) 137, a decision in the same Circuit, in which the Court said at page 141:

> "Appellant's insistence that the later decisions of the Supreme Court of the United States have made inapplicable the decisions cited and relied on by Appellee and the District Judge, misconceive the primary question at issue. This is not, as Appellant seems to think, what permissible reach, within the Federal Constitution, that court would, under the facts, give to a construction by the State Court of the Texas statute governing the doing of business in the State by, and the service of process upon, foreign corporations. *It is what construction the courts of Texas have actually given to the statutes.*" (Emphasis supplied.)

That there may be differences between the law of Florida and the law of California, or between the law of Texas and the law of California, these respondents would be the last to deny. That is the proposition involved in the precedent urged upon this Court by the petitioners.

With respect to the case of *McCarley v. Foster-Milburn Company*, 93 Fed. Supp. 421, cited on page 11 of brief for the petitioners, and distinguished by the opinion in the case at bar, two comments may be

made. One is that a Federal District Court sitting in New York State is in a less authoritative position to decide what constitutes doing business under California law than is an Appellate Court of the State of California. The other is that the Federal District Court misconceived the rationale of the factor acts, which were designed to permit distributors to pass title to goods which the distributors themselves do not own, in order to protect the ultimate consumers who buy the goods from the distributors in good faith. The factor acts were not designed to settle questions of what constitutes the doing of business, and the local representative's status as a factor, even if true, is not conclusive of this question by any means.

CONCLUSION.

No timely federal question was raised in the Courts of California. No federal question was considered there. Sufficient nexus has been shown to support jurisdiction; we are not here concerned with questions of the power of California to tax or to regulate foreign corporations. The sole question at issue is whether the California Appellate Court was correct in its decision of California law. No violation will be done to due process, to "the concept of ordered liberty," if these two petitioners are required to answer to the merits in the Courts of California.

It is respectfully submitted that the petition for certiorari should be denied.

Dated, San Francisco, California,
November 21, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 417

WESTWOOD PHARMACAL CORPORATION, a corporation, and FOSTER-MILBURN COMPANY,

Petitioners,

vs.

JOHN FIELDING, JR. and DOLPH OBERGFEL,

Respondents.

Reply Brief in Support of Petition for Certiorari

Much of respondent's brief is devoted to the contention that this Court lacks jurisdiction to grant certiorari because, so it is argued, the constitutional question was not raised below.

1. The opinion of the court below explicitly states that it was deciding the question of due process (Pet. for Cer., p. 3). This Court has often said that if the state court raises and decides the constitutional question, that fact conclusively establishes that the point was properly raised. E.g., *McCollum v. Board of Education*, 333 U. S. 203, 207; *Home Insurance Co. v. Dick*, 281 U. S. 397, 407; *Chicago R. & P. Railway Co. v. Perry*, 259 U. S. 548, 551.

In *Cissna v. Tennessee*, 246 U. S. 289, 293, noting that appellant had not urged below that the case turned on questions of federal

law except as that might be inferred from the nature of the grounds presented, the Court said:

> "But if the Supreme Court of the State treated federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised."

Here the court below could not have reached its decision without deciding the issue of due process against petitioners. Respondents argue that each State may have its own views of what constitutes "doing business" so as to subject a foreign corporation to the jurisdiction of its courts. So it may, but only within the limits of due process. A State may, on state grounds, choose to hold a foreign corporation not subject to service in circumstances where the federal constitution would impose no objection.* But the reverse is not true. A state decision holding service improper does not necessarily decide the federal question. A decision upholding service *necessarily* does.

2. Respondents assert (Br. p. 4) that the constitutional issue is not open, because an issue not raised in the trial court cannot be raised on appeal in California. We doubt the assertion as to California practice, but it is irrelevant, since the issue was in fact decided by the court below. *Home Insurance Co. v. Dick*, 281 U. S. 397. Moreover, this case did not come to the court below by way of appeal from a trial court. It was an original proceeding (Pet. for Cer. pp. 2, 6), and the opinion is conclusive that the issue was raised and decided in the very court where the case originated.†

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*On this ground respondents would distinguish *Polizzi v. Cowles Magazines, Inc.*, 197 F.2d 74, certiorari granted October 20, 1952. But that case arose in a federal court.

†It would be absurd to say that petitioners, having succeeded in quashing service in the trial court, could be deprived of the right to assert their constitutional protection when application was made to another court for a writ of mandamus. Moreover, the actors in the court below (respondents) did not see fit to lay before that court the record in the trial court (Pet. for Cer. p. 6). Thus they go outside the record in asserting what did or did not happen in the trial court.

3. Respondents next argue that when the court referred to "due process", that was not a sufficient identification of the Fourteenth Amendment.

This Court, applying a common sense test, has often said that no form of words is necessary, it being enough if by ordinary canons of construction what was said presented the federal question. E.g., *Tilt v. Kelsey*, 207 U. S. 43, 51; *Saltonstall v. Saltonstall*, 276 U. S. 260; *Missouri-Kansas etc. Railway v. Elliott*, 184 U. S. 530; *Bryant v. Zimmerman*, 278 U. S. 63, 67. In some of the cases, the constitutional provision was not identified by any designation. In *Tilt v. Kelsey*, the right asserted was not in terms stated to be claimed under the Constitution.

Here, in common sense and by ordinary usage the words "due process" specify the precise provision as much as do the words "Fourteenth Amendment".

This is not a case where the reference to due process was a mere shotgun epithet. The exact respect in which the claimed deprivation occurred was specified, to wit, "whether the corporations were doing business within this state * * * to the extent that assumption of jurisdiction over them is consistent with due process." (Pet. for Cer., p. 3).

This declares the issue with precision, all the more precise because the very issue has arisen in a multitude of cases.* For that reason *Thomas v. Iowa*, 209 U. S. 258, cited by respondent, is not in point.

4. Respondent next argues that the reference to "due process" in the opinion below should be treated as relating to a provision of the state constitution.

But again, a standard of common sense is required. In the context of the issue of "doing business" for the purpose of ac-

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*In many situations where certainty of expression is essential, the background of experience and common understanding has been held to be enough to make words certain. E. g., *Nash v. United States*, 229 U.S. 373; *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 115; *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Seven Cases v. United States*, 239 U.S. 510, 517; Reed, J. in *United States v. Petrillo*, 332 U.S. 1, 16.

quiring jurisdiction, everyone knows that "due process" relates to the federal constitution. This is what courts and counsel mean when they use the words. This is shown, for example, by *West Publishing Co. v. Superior Court,* 20 Cal. 2d 720, 128 Pac. 2d 777 and *International Shoe Co. v. Washington,* 326 U. S. 310, both cited in the opinion below. Citations in the opinion of the court whose judgment is sought to be reviewed may be examined to see whether the constitutional issue was raised and decided. Cf. *Bryant v. Zimmerman,* 278 U. S. 63. The opinion must be read as a whole, *State Tax Commission v. Van Cott,* 306 U. S. 511, 514, and in the light of the facts and issues of the case, *Perkins v. Benguet Consol. Mining Co.,* 342 U. S. 437 (which involved due process as respects doing business). The opinion below not only states that the question is one of due process but concludes (R. 60) that the facts did not present "a question of the power of the state," citing *International Shoe Co. v. Washington,* 326 U. S. 310, which involved the question of due process under the Fourteenth Amendment.

The words "due process" are not ambiguous. But even if they were, this Court has said in *Minnesota v. National Tea Co.,* 309 U. S. 551:

> "It is * * * important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action " (p. 557).

If "due process" under the state constitution had a different meaning from that under the federal, particularly if it imposed a greater restraint on the state, a different problem might be presented. But the case cited by respondent, *Manford v. Singh,* 40 Cal. App. 700, 181 Pac. 844, decided 33 years ago, settled that the state due process clause "prescribes nothing that is not comprehended by said section of the federal constitution" and "is manifestly in scope and purpose identical with said provision of the federal constitution." Consequently, neither judges nor attorneys concern themselves with the state provision since the higher federal sanction controls.

Respondent, we submit, misconstrues *Bowe v. Scott,* 233 U. S. 658. That case was decided on the authority of *Miller v. Cornwall Railroad Co.,* 168 U. S. 131 and *Harding v. Illinois,* 196 U. S. 78. In the *Cornwall* case the litigant's assertion in the state court was that he was not receiving a "remedy by the *due course* of law." The quoted words were in the precise language of the state constitution but not in the language of the federal. By ordinary canons of construction, the state constitution was invoked. In the *Harding* case there had been a vague assertion that a statute took "property without due process of law" without specifying the respects in which it did so, no authority was cited or argument advanced in support of the constitutional objection, and the state court's opinion showed that its decision was based on other grounds.

CONCLUSION

This case presents an important constitutional question. The attempt to avoid its consideration is hypertechnical. We respectfully submit that the petition for certiorari is entitled to be considered on its merits.

Dated: San Francisco, California, November 25, 1952.

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